(4)

No. 92-603

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DEBORAH C. COSTLOW
Counsel of Record
THOMAS C. POWER
WINSTON & STRAWN
1400 L Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-5700
Counsel for Respondents.

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Washington, D.C. • [illegible] • [illegible]

QUESTION PRESENTED

The Cable Communications Policy Act of 1984, which prohibits the operation of a cable television system that has not been franchised by the relevant state or local governmental authority, exempts from the definition of a "cable system" a facility that serves "only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right-of-way." 47 U.S.C. §522(6). The question presented is whether the Court of Appeals was correct in holding that the cable system definition violates the equal protection provision of the Fifth Amendment by arbitrarily distinguishing between a facility which serves commonly owned or managed multiple unit dwellings, and a facility which serves separately owned and managed multiple unit dwellings.

LIST OF PARTIES AND RULE 29 CERTIFICATION

The parties are correctly identified in the petition for a writ of certiorari. Richey-Pacific Cablevision Ltd. is the parent of Respondent Pacific Cablevision. None of the other Respondent corporations have parent companies or non-wholly owned subsidiaries.

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SUMMARY OF ARGUMENT

This Court should deny the petition for a writ of certiorari which seeks review of the appellate court's correct determination that the equal protection component of the Fifth Amendment still applies to socio-economic legislation. The statute at issue defines the term "cable system" and requires a person providing video programming over such a system to obtain a franchise from the appropriate local governmental authority. The cable sys-

tem definition and the corresponding franchise requirement apply to traditional community-wide cable operators who install their facilities throughout the public streets. The cable system definition excludes facilities serving only multiple unit dwellings, as long as the facilities are installed wholly on private property. However, some facilities serving multiple unit dwellings and which are located wholly on private property fall within the cable system definition, because the dwellings served are not commonly owned or managed.

The primary justification offered for the discrimination between the latter two types of facilities is that Congress conceivably meant to impose local franchising on facilities which, because of the larger number of subscribers they purportedly serve, resemble traditional cable systems. Yet the statute does not refer to system size, and indisputably exempts from the local franchising requirement certain systems which are capable of serving an entire community regardless of the number of subscribers and regardless of whether the properties served are commonly owned. As the appellate court found in applying the proper rational basis standard set forth in this Court's precedents, the classification is not rationally related to a legitimate government purpose.

Moreover, both the appellate court and the relevant federal agency invited Congress to address the issue as part of a then-proposed revision of the statute involved. Despite its knowledge of the appellate court's partial invalidation of the cable system definition, Congress declined to take any steps in response thereto, signalling its acceptance of that determination, during its subsequent passage of an act that even increases local regulation of cable television systems.

Because the appellate court's invalidation of the statutory provision is in accordance with the mandate of the

Constitution and the intent of Congress, the petition should be denied.

ARGUMENT[1]

I.

THIS COURT NEED NOT GRANT REVIEW BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE CLASSIFICATION OF VIDEO DISTRIBUTION SYSTEMS FOR PURPOSES OF LOCAL FRANCHISING JURISDICTION LACKS ANY CONCEIVABLE RATIONAL BASIS.

Equal protection requires "that all persons similarly situated . . . be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Unequal treatment of a particular group is permitted only if members of that group "have distinguishing characteristics relevant to interests the [government] has the authority to implement . . . ." *Id.* at 441.

The court of appeals determined that Congress did *not* intend in Section 602(6) of the Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C. §522(6), to require a local franchise of video distribution systems which (1) use wire only within the interior of a single multiunit dwelling (a "wholly private system"); (2) use wire within the interior of more than one multiunit dwelling and to interconnect such dwellings from a single headend[2] *if* all such dwellings are commonly owned, managed, or controlled (also a "wholly private system"); or (3) use radio or infrared, instead of wire, to intercon-

[1] Respondents have not included a statement of the case because the facts and proceedings as described by Petitioners are sufficient. However, to the extent Petitioners included legal argument within their statement of the case, *e.g.*, Pet. at 2-3, Respondents have presented their opposing arguments herein.

[2] A "headend" is the origination point for the system's signal transmissions where satellite receive-only dishes and an antennae tower combine and process all local and distant programming signals for distribution.

nect a group of multiunit dwellings under separate ownership, management or control from a single headend (an "internal system"), unless the video distribution system uses a public right-of-way.

The court of appeals determined that Congress *did* intend in Section 602(6) of the Cable Act to require a local franchise of video distribution systems which use wire within the interior of more than one multiunit dwelling and to interconnect such dwellings from a single headend *if* such dwellings are separately owned, managed or controlled (an "external, quasi-private system"), even if no public right-of-way is used.

Unlike traditional cable television systems, none of the above-described facilities uses the public rights-of-way in order to deliver their video programming to subscribers. All of the above-described facilities use wire for at least that portion of their systems within the interior of multiunit dwellings. All serve groups of multiunit dwellings, both commonly-owned and managed and separately-owned and managed. The sole "distinguishing characteristic" is that some video distribution systems use wire to cross a private property boundary line to interconnect and serve separately owned or managed multiunit dwellings while others use radio or "wireless" transmissions.[3]

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[3]In effect, Congress has required external, quasi-private SMATV operators to obtain a franchise which permits them to install facilities in public rights-of-way which they do *not* seek to occupy, but which does *not* authorize them to serve the private property they *do* wish to occupy. The mere fact that a cable operator is armed with a franchise does not entitle the operator to occupy private property over the objection of the owner. In the absence of a cable mandatory access statute forcing a landowner to allow the installation of cable facilities on private property, a landowner has a constitutionally protected right to exclude a franchised cable operator. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This is yet another reason why the imposition of a franchising requirement upon external, quasi-private system defies common sense. *See infra* at 12-18.

This *same* "distinguishing characteristic," *i.e.*, using wire rather than wireless to interconnect buildings, is deemed irrelevant for franchising purposes, however, if the interconnected group of multiunit dwellings is under common ownership. Therefore, as between those systems which employ only wire, rather than a combination of wire and radio transmission, the sole distinguishing characteristic is the ownership of the buildings served.

The court of appeals concluded that the latter characteristic was a distinction without a difference, and held the discriminatory franchising requirement unconstitutional as a violation of the equal protection component of the Fifth Amendment. Having done so, the court of appeals did not reach the issue of whether the discriminatory classification as between wired and wireless technologies also abridged the equal protection guarantee.

A. Dual Federal-Local Jurisdiction Over Interstate Media Of Communications In General And Cable Television In Particular Has Been Historically Limited To Those Media Which Use Public Rights-Of-Way For Signal Transmission.

The discriminatory franchising requirement must be examined in light of the long-standing congressional and FCC policy preempting local jurisdiction and regulation of interstate communications media. The single exception to exclusive federal control over interstate media has been the adoption of shared federal-local jurisdiction whenever certain interstate media must make use of the public rights-of-way in order to deliver their services to the public. Of all the video distribution systems at issue here, only traditional cable television systems place physical facilities in public rights-of-way.

Through passage of the Communications Act of 1934, 47 U.S.C. §§151-712, Congress reserved to the federal

government broad and exclusive authority to regulate interstate communications. Exclusive jurisdiction was asserted over

> all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission . . . .

47 U.S.C. §152(a). Congress intended these "broad responsibilities" to encompass traditional cable television as well as other forms of interstate communications. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-178 (1968).

The FCC has for almost 50 years preempted local jurisdiction over interstate communications. *See, e.g., National Broadcasting Co. v. United States,* 319 U.S. 190 (1943). The FCC has specifically preempted local regulation of those aspects of cable television not linked to the physical use of public rights-of-way. *Capital Cities Cable Inc. v. Crisp,* 467 U.S. 691, 702 (1984); *Brookhaven Cable TV Inc. v. Kelly,* 573 F.2d 765 (2d Cir. 1978), *cert. denied,* 441 U.S. 904 (1979); *General Tel. Co. v. FCC,* 413 F.2d 390, 398 (D.C. Cir. 1968).

However, the FCC has permitted minimal local regulation of certain aspects of traditional cable television, thus creating a "deliberately structured dualism" of federal and local jurisdiction. *Cable Television Report and Order,* 36 F.C.C.2d 143, *recon.*, 36 F.C.C.2d 326 (1972), *pet. for review den'd sub nom. ACLU v. FCC,* 523 F.2d 1344 (9th Cir. 1975). The FCC premised the local authorities' regulatory jurisdiction *solely* on traditional cable's use of the public rights-of-way:

> . . . [I]t would be beneficial to clearly delineate those general aspects of cable regulation which we believe are in the province of this agency and those that are the responsibility of non-federal officials. The ultimate dividing line, as we see it, rests on the distinction between reasonable regulations regarding use of the streets and rights of way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the states and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of this Commission. This is so because of the interstate nature of the medium as enunciated by the Supreme Court.

In Re Amendment of Part 76 of the Commission's Rules, 54 F.C.C.2d 855, 861 (1975), *citing United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) and *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

As new applications of existing technology have brought forth alternative video distribution systems, the FCC has consistently recognized the use of public rights-of-way as being the only basis for local jurisdiction over interstate communications. The FCC preempted local franchising regulation of MDS[4] or "wireless" video distribution systems precisely because no facilities were installed in public rights-of-way. *In Re Orth-O-Vision, Inc.*, 69 F.C.C.2d 657 (1978), *recon. den'd*, 82 F.C.C.2d 179 (1980), *pet. for review den'd sub nom. New York State Commission on Cable Television v. FCC,* 669 F.2d 58 (2d Cir. 1982). (These are the systems referred to by the court of appeals as "internal" systems.)

Equally significant, just prior to passage of the Cable Act, the FCC preempted local franchising regulation of

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[4] "MDS," or multi-point distribution service, transmits satellite and television programming throughout a community via radio frequencies rather than cable.

SMATV[5] systems serving multiunit dwellings which do not use public rights-of-way. *In Re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983) (*"ESCOM"*), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (*"NYSCCT"*).[6] The FCC rejected the argument that these SMATV systems should be subject to the same dual regulatory approach applicable to traditional cable, despite the similarity between the two industries with respect to their use of *wired* technology:

> . . . [T]he Commission established this duality [with respect to traditional franchised cable television] as a policy decision, rather than as a matter of law, *based on franchised cable's use of the public streets and rights-of-way and the particular local interests considered applicable to a cable operator, generally chosen to serve the community as a whole.*

95 F.C.C.2d at 1234 (emphasis added). The FCC reaffirmed the distinction it previously drew "between reasonable regulations regarding use of the public rights-of-way and the regulation of the operational aspects of cable communications," reserving to itself regulation of the latter and permitting local entry regulation only in regard to use of the public domain. *ESCOM*, 95 F.C.C.2d at 1235, citing *Orth-O-Vision*, 54 F.C.C.2d at 861.

The FCC refused to permit local jurisdiction over such SMATV systems because of the threat such regulation posed to the federal government's own statutory mandate

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[5]"SMATV," or satellite master antenna television, is a mini-cable facility serving a discrete property, such as an apartment building, the facilities of which are installed wholly on private property.

[6]Neither the FCC nor the D.C. Circuit reached the question as to whether preemption could extend so far as to embrace SMATV facilities serving separately-owned buildings.

to advance the entry and growth of diverse interstate communications media:

> State or local government regulatory control over, or interference with, a federally licensed or authorized interstate communications service, intentionally or incidentally resulting in the suppression of that service in order to advance a service favored by the state, is neither consistent with the Commission's goal of developing a nationwide scheme of telecommunications nor with the Supremacy Clause of the Constitution.

ESCOM, 95 F.C.C.2d at 1233. The FCC stated that a local franchising requirement "contradicts our efforts to create a more rapid and efficient interstate telecommunications marketplace." *Id.* at 1232.

Upon review of the *ESCOM* ruling, the D.C. Circuit emphasized the long-recognized distinction between video distribution facilities that use public rights-of-way and those that do not as the justification for excluding such SMATV systems from local franchising barriers:

> Petitioners contend that the Commission's refusal to give state and local governments the same amount of authority over SMATV as they have over traditional cable is a reversal of well-established policy. Careful review of Commission precedent, however, reveals that the petitioner's argument ignores the critical distinction the Commission has made between cable television systems that use public rights-of-way and systems, like SMATV, that are operated solely on private property.

NYSCCT, 749 F.2d at 808-09. The D.C. Circuit then reviewed the relevant precedent regarding the "dual regulatory framework" under which "the Commission has consistently retained exclusive authority over those elements of cable television that do not involve the use of public rights-of-way." *Id.* at 810.

Moreover, the petitioners in the *NYSCCT* case argued that the preemption of local franchising over MDS systems had no relevance to the FCC's decision to preempt local franchising over SMATV systems because of the technological differences between MDS, a "wireless" technology, and SMATV or traditional franchised cable, "wired" technologies. The D.C. Circuit rejected that contention by focusing on the "one critical" distinction between MDS and traditional franchised cable: MDS "is operated solely on private property and makes no use of public rights-of-way." *Id.* The D.C. Circuit found *no* pertinent distinction between MDS and SMATV, since both are operated wholly on private property, and in effect found that preemption of the former required preemption of the latter: "The Commission's preemption of [MDS], which, like the system involved in this appeal, does not use public rights-of-way, plainly refutes [the] contention that the Commission has arbitrarily reversed well-established policy." *NYSCCT,* 749 F.2d at 811. The exercise of exclusive federal jurisdiction turned not on the type of technology involved, *i.e.*, wired versus wireless, nor on the particular ownership or management of the building served, but rather on the non-use of public rights-of-way.

In enacting the Cable Act, Congress repeatedly referenced traditional cable's use of the public rights-of-way as the sole nexus for permitting any degree of local regulatory jurisdiction over an interstate medium of communications. The Senate Report quoted the FCC in concluding that the "ultimate dividing line" between federal and local jurisdiction "rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications." S.Rep. No. 67, 98th Cong., 1st Sess. 7 (1983), *quoting In Re Amendment of*

Part 76 of the Commission's Rules, 54 F.C.C.2d at 861. "The premise for the exercise of . . . local jurisdiction continues to be its use of local streets and rights of way." S.Rep. at 7.

The floor statements of individual members echo these conclusions. Senator Hollings, the ranking minority member of the Senate Commerce Committee, which oversaw the bill, stated, in the floor debate: "No one can doubt that localities should be able to exert some control over cable because it crosses public rights of way." 84 Cong. Rec. S8320 (daily ed. June 14, 1983). Senator Packwood, the Committee's chairman observed:

> Traditionally, the position of this country has been that local governments have no right to regulate communications. Cable is a form of communications. But for the sole reason that they have to string a wire, the Federal Government initially made a decision that they could regulate cable.

84 Cong. Rec. at S8314 (daily ed. June 14, 1983). And the House Report stated that a facility serving multiple unit dwellings was exempt from local franchising, unless "such facility or facilities use a public right-of-way," H. Rep. No. 934, 98th Cong., 2d Sess. 44 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, without regard to commonality of property ownership.

Thus, the distinguishing characteristic historically underpinning local jurisdictional control over interstate communications media has not been whether the particular technology employed was predominantly "wired" or "wireless", or the ownership or management of the buildings served by the communications medium, but rather whether use of the public rights-of-way was essential to the delivery of video services to the public, *i.e.*, the public versus private property distinction. Since this traditional demarcation point for exclusive federal jurisdiction versus shared federal-local jurisdiction is absent in

the instant case, the question becomes what other rational justification conceivably exists for subjecting those systems interconnecting separately-owned multiunit dwellings via wired technology to a franchising requirement that would not also justify imposing a franchising requirement upon (1) those systems interconnecting commonly-owned multiunit dwellings via wired technology and (2) those systems interconnecting separately-owned multiunit dwellings via wireless technology. Congress was, however, crystal-clear that video distribution systems falling within these latter two classifications could operate free of local jurisdictional interference.

B. The Justifications For The Discriminatory Classification As Proferred By Chief Judge Mikva And Urged Upon This Court By Petitioners Are Not Plausible And Defy Common Sense.

Petitioners posit that the "justifications conceived by Chief Judge Mikva fall well within the range of 'rough accommodations' [citation omitted] that the democratic process is entitled to make under rationality review." Pet. at 10-11. Specifically, Petitioners advance a single argument in support of Congress' discriminatory franchising requirement as between SMATV operators serving commonly-owned versus separately-owned buildings:

> First, it stands to reason that in contrast with facilities serving separately owned units, a requirement of common ownership, control, or management imposes a relative constraint upon the size of the market being served by the relevant SMATV facilities. The constraint on size gives each consumer of cable services greater leverage over the product supplied. Second, that leverage is likely to be enhanced by the fact that all of the consumers will be able to use their status as unit owners or tenants to bring common pressure to bear on a single set of owners or managers who provide or purchase all of a facility's service.

Pet. at 13-14. In short, Petitioners claim that the larger the video distribution system is, the greater is the need for local government regulation to insure that consumers are protected.

Respondents disagree that the above rationale "stands to reason". First, the commonly owned, managed or controlled requirement does *not* impose *any* "constraint upon the size of the market being served by the relevant SMATV facilities." If an SMATV operator wishes to serve separately-owned multiunit buildings and is denied the prerequisite local franchise, for example, the SMATV operator need only install a separate satellite headend facility on each of the separately-owned private properties sought to be served. In this manner, the actual size of the cable market being served by a single SMATV operator is no different than the size of the market which that same SMATV operator could serve if it were able to interconnect those same separately-owned buildings to a single headend via a piece of cable instead.

Thus, all the discriminatory franchising requirement imposes is a financial disincentive upon those SMATV operators who wish to serve separately-owned buildings *at the request of the building owner;* it does not prevent such buildings from being served by a single "multidish" operator. The "practical effect" of the discriminatory classification is to escalate the cost of serving separately-owned buildings, from the minor cost of a length of interconnecting cable strand to the major cost of an entire duplicative satellite headend facility to be installed a bare backyard or rooftop away from the first satellite headend facility. *See United States Dep't of Agriculture v. Moreno,* 413 U.S. 528, 537 (1973) (overturning on equal protection grounds a legislative classification the practical effect of which did not operate rationally to further stated governmental interest because the classification could be avoided by those whom the government intended

to exclude from benefits by the classification). Indeed, given the practical effect, the forced expenditure of funds to enter the market through multidish installation rather than through a mere cable interconnection becomes tantamount to a punishment for choosing the SMATV business rather than the MDS business. *See James v. Strange*, 407 U.S. 128, 141-42 (1972) (while statute may "betoken legitimate state interests", "interests are not thwarted by requiring more even treatment" of similarly-situated persons where effect of statute "embodies elements of punitiveness").[7]

If, as Petitioners claim, Congress intended to protect consumer welfare by restricting the size of the video distribution systems that could serve consumers free of local government *entry* regulation, the means chosen by Congress to ensure that larger systems do not escape regulation defy common sense.[8] To maintain that Congress acted rationally to attempt to constrain the size of SMATV systems not subject to local regulatory oversight by imposing the financial hardship of such "multidish" entry, rather than simply legislating that no SMATV operator may serve more than "x" number of subscribers without a franchise, is itself irrational.[9]

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[7] Rather than placing burdens on the development of SMATV, Congress meant to eliminate obstacles to the development of competition to the established franchised cable industry. Thus, the House Report voiced congressional support of

> the growth and development of alternative delivery systems for [video] services, such as DBS, SMATV and subscription television. The public interest is served by this competition, and it should continue.

H. Rep. at 22-23.

[8] For example, the statute would permit a video provider without a franchise to serve adjoining apartment buildings owned by a single landlord. But if the landlord sold one of the buildings, video service must cease. This result does not serve any consumer interest.

[9] Congress knows how to tailor legislation to the size of the cable facility. For example, the Cable Act exempts cable systems serving "fewer than 50 subscribers" from the Act's equal employment opportunity provisions. 47 U.S.C. §554(h)(2). Similarly, the FCC is required to adopt regulations specifically for "cable systems that have 1,000 or fewer subscribers" under newly-enacted 47 U.S.C. §543(i). *See* H.R. Cong. Rep. No. 102-862, 102d Cong. Sess. 12 (1992).

Second, the absence of *local entry* regulation does not leave consumers bereft of regulatory protection regardless of "system size"; the FCC can regulate all of the interstate communications media at issue here. Indeed, the very basis for the FCC's preemption of local jurisdiction over SMATV and MDS facilities in the *ESCOM* and *Orth-O-Vision* decisions was the FCC's conclusion that such local entry regulation was *counter* to consumer welfare. *See ESCOM*, 95 F.C.C.2d at 1232 ("preemption . . . will ensure continued development and increased programming diversity to viewers of SMATV"); *accord, Orth-O-Vision*, 69 F.C.C.2d at 669. Accordingly, Chief Judge Mikva's proffered "consumer-interest and diversity-of-information rationales", App. at 43a, for local jurisdiction are contradicted by the very FCC precedent exempting such systems from local jurisdiction.

Third, Petitioners studiously avoid any discussion of what rational basis Congress would have had for imposing local regulation upon SMATV systems of a "larger size", while exempting all MDS systems from such local regulation no matter what their size. Petitioners concede that many SMATV operators interconnecting commonly-owned multiunit dwellings will serve more subscribers than their SMATV counterparts interconnecting separately-owned multiunit dwellings. Pet. at 14, n.11. As set forth directly above, the SMATV operator in a particular locality interconnecting commonly-owned buildings is more likely than not to be the *same SMATV operator* who has simply been forced to install multiple dishes to serve separately-owned buildings since interconnection by wire would trigger the franchising requirement. In contrast, MDS operators will always be larger than

SMATV operators since omnidirectional wireless technology enables such operators to reach every single resident in the *entire* municipality from a single transmission point as long as line-of-sight barriers do not interfere.

If, as Petitioners urge, the legitimate governmental interest sought to be achieved by the discriminatory classification is to protect consumers by subjecting video distribution systems having a "larger subscriber base" to local regulation, it makes no sense that Congress did not also seek to restrict the market size of locally unregulated "wireless" operators or simply subject all video distribution systems, wired or wireless, over a certain size to the franchising requirement. Surely, Petitioners do not mean to argue that consumers of video services distributed by wireless technology are less deserving of local regulatory "protection" than consumers of wired technology.

The court of appeals' rejection of the "system size" justification makes eminent good sense. If any of the video distribution systems are "similar" to traditional cable systems on the basis of this "system size" characteristic, it is MDS or wireless systems, not SMATV systems.[10]

[10] Petitioners argue that Chief Judge Mikva's supposition that cable facilities serving commonly owned buildings are "less in need of regulation" is "implicit in the FCC's consistent pre-Cable Act policy . . . ." Pet. at 13, n.10. This argument is both incorrect and irrelevant. It is incorrect because the prior FCC rulemakings cited by Petitioners simply do not state that their purpose was to create an exemption from regulation based on the size of the facility. That is a *post hoc* rationalization, conceived by Chief Judge Mikva, that finds no support in the texts of the earlier Commission decisions. Even if that rationalization is imposed retroactively on the older cases, the unconstitutionality remains because, as shown above, the purported interest in imposing local regulation on larger cable facilities is not furthered by the distinction among facilities drawn by the statute at issue. At best, Petitioners can rely on the prior FCC cases only to make the irrelevant argument that the regulation found by the D.C. Circuit to be unconstitutional has been unconstitutional for many years.

While the justification proffered by Chief Judge Mikva for why wired, but not wireless, facilities serving separately-owned buildings need obtain a local franchise was only mentioned and not discussed by Petitioners,[11] Respondents feel compelled to address the contradiction which that justification poses to both Congress' and the FCC's own stated policies. Although the majority could conceive of no rational basis for this distinction, App. at 34a, Judge Mikva opined that Congress simply could have intended to "encourage[ ] SMATV operators to use radio-wave technology instead of cable wiring," and that such a policy choice by Congress does not give rise to an equal protection challenge. App. at 42a.

This justification flies in the face of "certain basic facts" that have dictated decades of congressional and administrative policy with respect to communications, foremost of which is that "the radio spectrum simply is not large enough to accommodate everybody." *National Broadcasting Co. v. United States,* 319 U.S. 190, 213 (1943). As this Court repeatedly has held, it is the scarcity of radio frequencies that justifies extensive federal regulation of the airwaves, notwithstanding the obvious constitutional concerns that shadow any regulation of speech-related activities. *Id.* at 210-16; *Red Lion Broadcasting v. FCC,* 395 U.S. 367, 375-77, 386-90 (1969). Because of spectrum scarcity, Congress has directed the FCC to allocate frequencies in an "efficient" manner, 47 U.S.C. §307(b), and to "encourage . . . more effective use of radio . . . ." 47 U.S.C. §303(h).

Nevertheless, at this point "virtually all of the usable spectrum already is allocated to specific services, and

[11] Petitioners note that the court of appeals did not need to reach the constitutionality of the distinction between wired and wireless facilities interconnecting separately-owned buildings given its ruling overturning the distinction drawn between SMATV facilities on the basis of the ownership of the property served. Pet. at 13, n.9.

Judge Mikva dissented for the reasons stated in his previous concurrence. *Id.* at 7a.

SUMMARY OF ARGUMENT

The decision of the court of appeals is incorrect for at lease two related reasons. First, to the extent that the court rejected "conceivable" justifications for the distinction as lacking support in the legislative history or administrative record, it engaged in too grudging an application of the rational-basis test. It is well established that a rational basis, otherwise sufficient to support legislation, need not be articulated or even considered by the legislature. *See, e.g., Nordlinger v. Hahn*, 112 S. Ct. 2326, 2334 (1992). Nor is there any authority for requiring administrative development of the facts justifying the legislature's decision.

Second, to the extent that the court of appeals thought the asserted justifications themselves to be irrational, it too readily imposed its own judgments, rather than deferring to the wisdom of Congress. If Congress believed that different types of SMATVs stand on a different footing, then a federal court should not override that belief unless the facts plainly show that no difference exists. Here, the likelihood that SMATVs serving buildings under common ownership will be smaller and more responsive to consumers is enough to sustain the statute, under proper application of the rational-basis test.

Finally, we note that the new line imposed by the court of appeals—exempting all SMATVs from local regulation while requiring such regulation for all conventional cable systems—is at least as problematic as the line originally drawn by Congress. This new rule creates a potential for serious competitive inequities between similar providers

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5a-6a. The court did not ultimately address the second distinction discussed in its previous opinion—between wired systems serving separately owned and controlled dwellings and systems relying on wireless technology to interconnect such dwellings. *Id.* at 3a-4a.

of cable services. That potential is a further illustration of the reasons for allowing legislators to determine the precise scope of economic regulations.

ARGUMENT

This case, as it stands before the Court, involves a narrow, specific question: whether, under the rational-basis standard of the equal protection clause, it was rational for Congress to require SMATVs serving multiple-unit dwellings under separate ownership and management to get local franchises even though SMATVs serving similar dwellings under common ownership or management need not. The court of appeals held that there was no reasonable basis for treating the SMATVs differently, solely because of the nature of the ownership and management of the buildings involved. This ruling was erroneous both because the court incorrectly required a showing of rationality in the administrative record and because the court disregarded conceivable, reasonable justifications for the line drawn by Congress.

I. A STATUTE MAY BE UPHELD AS RESTING UPON A CONCEIVABLE RATIONAL BASIS EVEN IF THE BASIS IS NOT DISCUSSED IN THE LEGISLATIVE HISTORY OR IN AN ADMINISTRATIVE RECORD.

The basic standard for judging statutory classifications under the equal protection clause requires little discussion. A legislative distinction that does not burden a suspect class or a fundamental interest will be sustained "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *see Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 457-58 (1988); *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). As

this Court has observed, this standard means that a classification will be upheld "'if any state of facts reasonably may be conceived to justify it.'" *Sullivan v. Stroop*, 110 S. Ct. 2499, 2504 (1990) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987)).

The court of appeals appeared to accept this standard in theory—equivocally in its first opinion (Pet. App. 35a), more definitely in its second opinion (*id.* at 4a)—but not in practice. Thus, although Judge Mikva offered justifications for the distinctions made in the statutory scheme, the court said that it found no rational basis for them "[o]n the record before us." *Id.* at 34a. It then remanded for the presentation of additional "legislative facts." *Id.* at 36a. After the report by the FCC offered no new legislative facts—resting instead on the justifications previously advanced by Judge Mikva—the court discounted those justifications as a "mere impression" or "intuition," which the Commission, despite the prior invitation, had "failed to flesh . . . out." *Id.* at 4a.

This approach demands too much. Although it is true that Congress did not explain its classifications along the lines suggested by Judge Mikva, it was not required to do so. Only last Term, this Court again made clear that "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 112 S. Ct. at 2334; *see United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). Moreover, if the rationality of a legislative distinction depends on particular facts, those facts need not be proved in court. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). Rather, it is up to those challenging the statute to "'convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Ibid.* (quoting *Vance v. Bradley*, 440 U.S. at 111).

It would be extraordinary, in fact, to have any different rule—in essence requiring Congress (or, perhaps, an implementing agency) to "make a record" in support of each statutory classification. Any piece of complex economic legislation is likely to involve a "process of line-drawing," *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 179, and that process is not lightly to be second-guessed. As this Court has stated, "[s]ocial and economic legislation like the statute at issue in this case . . . 'carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.'" *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. at 462 (quoting *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981)). It is enough, therefore, "that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant government decisionmaker." *Nordlinger v. Hahn*, 112 S. Ct. at 2334 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959)). That purpose "may be ascertained even when the legislative or administrative history is silent." *Ibid.* (citing *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969)).

The court of appeals thus erred in rejecting possible justifications for the statute because they were not grounded in "the record" before it (Pet. App. 34a) or "flesh[ed] . . . out" by the Commission (*id.* at 4a). Once Judge Mikva had advanced possible grounds for the statutory distinction, and certainly once the Commission had endorsed them after remand, the court should have addressed them squarely and, if convinced that they were irrational, explained its reasons for thinking so. To strike down a federal statute without undertaking that necessary analysis is an improper application of the rational-basis test established by this Court.

II. THE JUSTIFICATIONS ADVANCED BY JUDGE MIKVA, AND ENDORSED BY THE COMMISSION, ARE ADEQUATE TO SUSTAIN THE STATUTE UNDER THE RATIONAL-BASIS TEST.

It is not enough, of course, that the purpose of a statutory classification be "conceivable"; it must also be "rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. at 303. The distinction here—between different classes of SMATVs—meets that standard.

The court of appeals appeared unable to appreciate the differences between SMATVs serving dwellings under separate ownership and SMATVs serving dwellings under common ownership because it was struck by one similarity between them: neither system uses public rights-of-way. But, for purposes of the rational-basis inquiry,[5] that is only the beginning of the analysis. Even though two classes of SMATVs may be identical in one respect, they may differ in other material respects. And it is upon those differences that the legitimacy of the statutory classification will ultimately depend.

It is to that question that Judge Mikva turned his attention. And, in his initial opinion, he articulated fully conceivable, rational reasons why, regardless of use of rights-of-way, Congress could have decided to exempt from regulation only SMATVs serving commonly owned or managed buildings. He noted the reasonable and accurate proposition "that a SMATV system serving multiple buildings not under common ownership is similar to a traditional cable system and likely to give rise to similar problems from the perspective of the viewer." Pet.

[5] The fact that a business like respondents' does not use public rights-of-way may or may not be relevant to its First Amendment or other arguments. But the precise question here is simply whether there are differences between the favored class (SMATVs serving commonly owned dwellings) and the disfavored class (SMATVs serving separately owned dwellings) that support the distinction.

App. 42a-43. In contrast, Congress might reasonably have thought "that a SMATV facility serving buildings under common ownership is likely to be smaller, and the ability of the residents to influence ownership likely to be greater, so that the costs of regulation could outweigh the benefits." *Id.* at 43a.[6] In the latter case, after all, the leverage exercised by consumers would be enhanced not only because of the relatively small scale of the SMATV but for another reason as well: unit owners or tenants would have an existing, broader economic relationship with the single building manager or owner controlling the SMATV. It follows that Congress could rationally conclude that it was appropriate to have local governments regulate the first class of SMATVs, but not the second.[7]

It may well be that *some* SMATVs serving commonly owned dwellings will be larger, and thus in theory less responsive to consumers, than *some* SMATVs serving separately owned dwellings. But that possibility does not mean that it was irrational for Congress to believe that, in general, the reverse will be true. A law remains constitutional even if it "only partially ameliorate[s] a perceived evil and defer[s] complete elimination of the evil to future regulations." *City of New Orleans v. Dukes*, 427 U.S. at 303 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955)). Moreover, "rational distinctions may be made with substantially less than mathematical exactitude." *Ibid. See Burlington N.R.R. v. Ford*, 112 S. Ct. 2184, 2187 (1992); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976).

[6] *See* 47 U.S.C. § 521(6) (expressing a legislative goal of "minimiz[ing] unnecessary regulation that would impose an undue economic burden on cable systems").

[7] Absent this requirement, the only limitation on future development of exempted SMATVs would be the number of existing private residential communities (comprised of independently owned and managed buildings) that could be wired together without use of public rights-of-way.

The choice made here by Congress is not only rational but supported by a lengthy history of FCC regulation in the cable field. For many years prior to the enactment of the Cable Act, the FCC exempted from regulation those "master antenna television systems" ("MATVs") that served buildings under common ownership or management. *See* Pet. App. 12a-13a; *In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, 63 F.C.C.2d 956 (1977); *id.*, 67 F.C.C.2d 716 (1978).[8] It did so on the express theory that the exempted systems would be small enough that they would not require the types of regulation applicable to cable systems. *Id.* at 726. This distincton was later carried forward to SMATVs, after satellite technology had come into operation and expanded the number of channels that a MATV system could provide. *See* Pet. App. 13a; *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 807 n.1 (D.C. Cir. 1984); *In re Cable Dallas, Inc.*, 93 F.C.C.2d 20, 21 (1983).

It was thus hardly surprising that, in deciding what cable franchising requirements to impose in the 1984 Cable Act, Congress followed the FCC's lead in determining whether particular types of systems are sufficiently similar to conventional cable systems to justify regulation. Like the FCC, Congress was faced with a range of potential subjects of regulation, ranging from single-building master antenna systems up to large municipal cable systems. Systems that interconnect independently owned buildings without using rights-of-way occupy an intermediate position in this range. Like traditional cable systems, they may provide video programming to whole communities of independently owned

[8] MATVs differ from SMATVs only because the latter use satellite dishes to pick up and distribute additional channels such as HBO or ESPN.

residential buildings; yet, unlike traditional cable systems, they do not use public rights-of-way. In view of the intermediate status of these systems, it is difficult to say that Congress violated the rational-basis standard when it chose to put them on one side of the regulatory line rather than the other.

In any event, if the court of appeals had good reasons for saying that the explanations offered by Judge Mikva were inadequate, it never said what those reasons were. To the contrary, Judge Mikva's explanations were never specifically addressed by the majority at all. Thus, while the majority noted that "putative justifications" had been offered, and had been endorsed by the FCC in the initial remand, it simply declared that they constituted nothing more than an "impression of 'similarity'" between conventional cable systems and non-exempted SMATVs. Pet. App. 4a. It then rejected this impression as a "naked intuition, unsupported by conceivable facts or policies," largely because the justifications had not been "flesh[ed] . . . out" by the FCC. *Ibid.*

This out-of-hand dismissal, however, gets matters backwards. Insofar as Judge Mikva (and the FCC) had put forward a "conceivable" basis for the classification, the court was obliged to address that basis on its merits. But the majority below acted as if it were reviewing some sort of independent administrative determination by the Commission (which, after all, was merely following the plain intent of Congress in the Act)—requiring the development of a sufficient factual record to satisfy the court of the determination's rationality. There was no reason to require the FCC to do anything to develop "legislative facts" supporting Congress's prior determination. Nor was the court correct in demanding that *it* be "convinced" of the factual basis of the justifications. Its sole proper role was to determine whether *Congress* could reasonably have believed the relevant facts to be true. By that standard, the statute clearly passes constitutional muster.

III. THE BROADER EXEMPTION MANDATED BY THE COURT OF APPEALS WILL CREATE COMPETITIVE INEQUITIES.

The irony of this case is that the distinction mandated by the D.C. Circuit—requiring franchising of all conventional cable systems but exempting systems that interconnect independently owned buildings in private communities—is at least as problematic as the line originally drawn by Congress. Under the decision below, cable systems will continue to be subject to extensive local regulation, but systems that are substantially similar (because they interconnect entire communities of independently owned and operated residential buildings) will not. The latter systems will be free to compete with franchised cable systems without incurring any obligation to offer services in other areas or subjecting themselves to any requirements concerning the types of programming and services that they must offer. They will be exempt from franchise fees and from the other duties imposed by the Cable Act and franchising officials.

Viewed in light of the policies espoused by Congress, as well as those reflected in the First Amendment, this state of affairs is highly questionable.[9] To the extent that the judicially expanded exemption makes it difficult or impossible for franchised cable systems to compete in private communities served by SMATVs, residents in those communities may be left with only one option—a system that may be less responsive to their needs and

[9] As discussed above, the Court is not here presented with respondents' claims that the distinction drawn by Congress violates the First Amendment or requires heightened equal-protection scrutiny. We note, however, that NCTA agrees with respondents that differential regulation of First Amendment "speakers" can sometimes raise First Amendment concerns. Our point here is that the new line mandated by the court of appeals is *more* problematic in this regard, because it produces differential treatment of two types of video-delivery systems that directly compete. A narrower exemption for SMATVs in commonly owned or operated buildings creates fewer constitutional concerns.

that is not subject to any regulation of its services by local franchising authorities. Franchised cable systems, in turn, will continue to be required to submit to regulatory requirements, without having an equal opportunity to obtain customers in areas that will tend to be highly desirable as a commercial matter.

The problematic nature of the line mandated by the court of appeals thus illustrates well the wisdom of leaving that determination to Congress, rather than the courts. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (this Court has "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws"). Absent some reason for concern that a particular line drawn by Congress was chosen for "suspect" reasons or interferes unduly with the exercise of constitutional rights, intrusive judicial review is just as likely to impede implementation of rational social and economic policy as it is to promote it. Here, it made no sense for a court to decide to maintain a costly regulatory system applicable to one type of cable operator, while exempting direct competitors that Congress expressly, and for rational reasons, sought to bring under that system.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

DANIEL L. BRENNER
MICHAEL S. SCHOOLER
DIANE B. BURSTEIN *
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3664

H. BARTOW FARR, III
PAUL M. SMITH
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

Counsel for National Cable Television Association, Inc.

* Counsel of Record